



Labor & Employment Law Section



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

In this issue ...

Federal

[Disability Discrimination](#)

[Age Discrimination in Employment Act](#)

[Title VII Update](#)

[Family and Medical Leave Act](#)

[Wage and Hour](#)

State

[State Law Discrimination Update](#)

[Unemployment Compensation](#)

[Minnesota Tort and Contract Cases](#)

Other

[State Legislation](#)

[Public Sector](#)



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Disability Discrimination

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Eighth Circuit

Employer Not Required to Keep Position Open Indefinitely

[*Peyton v. Fred's Stores of Arkansas, Inc.*](#), 561 F.3d 900 (8th Cir. 2009), 21 A.D. Cases 1345, 39 NDLR P 4, *petition for cert. filed*, (July 14, 2009): The Eighth Circuit affirmed summary judgment in favor of Fred's Stores, holding that Peyton, a retail store manager who was discharged while undergoing cancer treatment, was not otherwise qualified to perform the essential functions of her job because the company did not have any information regarding her estimated return date at the time of her discharge.

Peyton was diagnosed with ovarian cancer on January 9, 2006, three days after she began working in the store. Peyton underwent surgery on January 12. Between January 12 and 14, an area manager phoned Peyton's hospital room twice, asking how the company could accommodate her. Peyton responded that she did not know how long she would be out, but she was under the influence of medication at the time and had no recollection of the accommodation offer. On January 14, the company terminated Peyton's employment. After completing six months of cancer treatment, Peyton was physically able to perform the duties of store manager.

In affirming summary judgment, the Eighth Circuit rejected Peyton's argument that the company should have waited indefinitely to determine the full extent of her diagnosis, treatment and recovery. The court emphasized that Peyton admitted that at the time of termination, she did not know if she would be able to return to work. The court also rejected Peyton's argument that, because she was hospitalized and medicated at the time of her termination, the company should have done more to initiate the interactive accommodation process.

Termination and Failure to Rehire as Economically Motivated

[*Willnerd v. First National Nebraska Inc.*](#), 558 F.3d 770 (8th Cir. 2009), 21 A.D. Cases 1164, 38 NDLR P 209: The Eighth Circuit reversed the judgment of the district court, holding that bank loan officer/sales representative Willnerd raised factual issues as to whether the

reasons for his discharge and the bank's failure to rehire him were pretext for disability discrimination under the ADA.

Willnerd suffers from hyperkinetic disorder, a voice condition that limits his ability to speak in a normal or controlled tone. First National terminated him from a position that required substantial interaction with the public, claiming that economic conditions required a reduction in force and that Willnerd was most expendable due to his poor performance. Thereafter, First National failed to rehire Willnerd after he applied for several other positions.

In reversing the district court, the Eighth Circuit held that Willnerd presented sufficient evidence to raise a genuine issue that the reasons for his discharge were pretextual, where he was the only one given a production quota that reasonable jurors could view as unattainable, managers gave inconsistent statements regarding whether his coworkers were considered for the reduction in force, his replacement did not perform at his level, a similarly situated coworker was retained despite his inability to meet the quota imposed on Willnerd, and a manager admitted that he was concerned about customers' perceptions of Willnerd.

The court also determined that Willnerd established a failure-to-hire claim, where factual issues existed as to the extent of his limitations in relation to the essential functions of the open positions, there was no evidence that the hiring decisions were based on a physician's report that stated the Willnerd was unable to work in positions that required speaking with clients, there was a fact issue regarding whether he had greater experience and education than the selected candidate, and the record did not support the bank's claim that Willnerd lacked the required experience for one of the open positions.

\$475,000 Jury Award to Epileptic Employee

[*Finan v. Good Earth Tools Inc.*](#), 565 F.3d 1076 (8th Cir. 2009), 21 A.D. Cases 1542: The Eighth Circuit affirmed the jury verdict, holding that Finan, a traveling sales representative with epilepsy, presented sufficient evidence that Good Earth terminated his employment because it regarded him as disabled.

Good Earth argued that Finan's regarded-as claim failed because he was not qualified to perform the essential functions of his position. The court held, however, that Finan presented sufficient evidence that he was fit to drive and perform other essential functions of the traveling salesperson job without accommodation.

The court further determined that Finan's receipt of private and Social Security disability benefits did not prove that he was disabled under the ADA.

Finally, the Eighth Circuit held that the district court did not abuse its discretion in allowing Finan to introduce evidence that he was not given a reasonable accommodation. Although the court acknowledged that an employee who is regarded as disabled is not entitled to a reasonable accommodation, the court also noted that Good Earth's responses to his requests for accommodation are probative as to whether the company harbored animosity toward Finan due to his epilepsy.

District of Minnesota

Scent-Free Workplace and Working from Home

Heaser v. AllianceOne Receivables Management, Inc., No. 07-CV-2924, 2009 WL 205209 (D. Minn. Jan. 27, 2009) (only the Westlaw citation is available): The district court granted AllianceOne's motion for summary judgment, holding that Heaser did not demonstrate that the company failed to make reasonable accommodations for her disability under the ADA and MHRA.

Heaser, a debt collector, informed AllianceOne that she suffered from toxic encephalopathy, a neurological disorder that causes cognitive problems and allergic reactions. In response, AllianceOne made approximately twenty accommodations, including implementing a voluntary scent-free policy, training other employees, furnishing Heaser with a new workstation, installing a new air flow vent, creating a scent-free restroom, posting additional no-smoking signs, and purchasing an air purifier for Heaser's use. Despite these accommodations, Heaser continued having allergic reactions and she took a medical leave of absence. AllianceOne denied Heaser's requests for a mandatory scent-free workplace or to allow her to work from home and it terminated Heaser when she did not return from medical leave.

In granting AllianceOne's motion, the court noted that the company had made numerous efforts to accommodate Heaser and that a mandatory scent-free workplace policy would impose an undue burden on AllianceOne because it would be difficult to enforce and may violate the rights of other employees. The court also found that Heaser failed to show that it was reasonable to allow her to work from home, given that she presented no evidence that remote access to AllianceOne's system was feasible or that the company had allowed it in the past.

Schedule Change

Arens v. Hormel Food Corp., No. 06-4701, 2009 WL 579580 (D. Minn. Mar. 6, 2009) (slip opinion): The district court granted Hormel's motion for summary judgment on plaintiffs' disability discrimination claim. The plaintiffs all had medical work restrictions that limited them to forty-hour workweeks. As a result, Hormel transferred the plaintiffs from a Monday-through-Friday schedule to a Tuesday-to-Saturday schedule. The court held that the plaintiffs did not suffer an adverse employment action because the schedule change neither reduced their salaries or benefits nor materially changed or diminished their job responsibilities. The court rejected the plaintiffs' argument that they had suffered a material employment disadvantage because the Tuesday-to-Saturday schedule was less desirable, noting that the plaintiffs occasionally worked overtime on weekends before acquiring their medical work restrictions.



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Age Discrimination in Employment Act

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Supreme Court Rejects Mixed-Motives Proof Model in ADEA Cases

[Gross v. FBL Financial Services, Inc.](#), ___ U.S. ___, No. 08-441 (June 18, 2009): In this appeal from a decision by the Eighth Circuit Court of Appeals, the Supreme Court, in a 5-4 ruling, vacated the Eighth Circuit ruling and held that the mixed-motives proof model does not apply to ADEA claims. This decision reflects a significant change and confirms that ADEA claims are now analyzed differently than mixed-motives claims under Title VII, a result that some commentators have predicted may be altered by an amendment to the ADEA.

At the trial, the plaintiff prevailed on his ADEA claim after the jury had been given a “mixed-motives” instruction under which the jury was informed that if the plaintiff’s age was a “motivating factor” in the employer’s decision to demote him, the verdict could nonetheless be for the employer if it proved that it would have demoted the plaintiff regardless of his age. The Eighth Circuit reversed the judgment for the plaintiff, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because it had not been told that Gross was required to present “direct evidence,” i.e., evidence “sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action,” in order to be entitled to shift the burden of persuasion to the employer as set forth in the mixed-motives instruction.

Although the parties asked the Supreme Court to decide whether a plaintiff was required to present “direct evidence” in order to obtain a mixed-motives instruction in an ADEA case, the Court majority never addressed that specific issue as it instead determined that the burden of persuasion *never* shifts to the defendant on an alleged mixed-motives claim under the ADEA, a departure from the approach under Title VII. The Court held that Title VII case law did not control its construction of the ADEA because “Title VII is materially different with respect to the relevant burden of persuasion.” While noting that *PriceWaterhouse* and the related changes to Title VII implemented by the Civil Rights Act of 1991 stand for the proposition that the burden of persuasion shifts to the employer in a Title VII case once the plaintiff proves that an impermissible factor “played a motivating part” in an employment decision, the Court held that this framework was not mandated by the ADEA. Congress did not amend the ADEA as it did for Title VII when it made the statutory changes reflected in the Civil Rights Act of 1991, noted the Court, and the text of the ADEA does not authorize a mixed-motives claim.

"Applying traditional standards of proof and the ADEA text requiring that a plaintiff establish that he was discriminated because of" age, the Court held: "To establish a disparate-treatment claim under the plain language of the ADEA, ..., a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."

The four dissenting justices adopted the view that the "most natural reading of [the ADEA] statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee," and concluded that the majority disregarded both Congress' intent and Court precedent. The dissenters asserted that the "but-for" causation standard endorsed by the majority had been previously considered and rejected by the Court in *Price Waterhouse*, in which the Court had construed identical "because of" language found in Title VII. Accordingly, the minority found it "particularly inappropriate" to "adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII." The dissenting justices also maintained that mixed-motive jury instructions are appropriate where the facts warrant in ADEA cases and that a plaintiff need not present direct evidence to obtain such an instruction.

U.S. Supreme Court

Validity of Collective Bargaining Agreements Requiring Arbitration

[14 Penn Plaza LLC v. Pyett](#), 129 S. Ct. 1456 (2009): In a five-four decision, the Court held "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." Following the decision, one observer commented that the ruling confirms that collectively bargained arbitration agreements are now as valid and enforceable as non-union individual arbitration agreements.

The majority opinion, authored by Justice Thomas, notes that nothing in the ADEA prohibits arbitration of ADEA claims. It also distinguishes *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), noting that the arbitration provision at issue in *Pyett* expressly applied to both statutory and contractual claims, whereas the provision in *Gardner-Denver* gave an arbitrator authority to resolve only contract questions.

The dissenting justices, in an opinion by Justice Souter, took the position that *Gardner-Denver* resolved that unions could not waive an individual employee's access to a judicial forum to resolve a statutory discrimination claim, and asserted that this rule should continue to be followed with respect to ADEA claims. The dissenting justices challenged the position adopted by the majority that the statutory right of access to a federal forum was not a substantive right that unions were precluded from waiving.

The facts of *Pyett* presented an unusual situation in which the union declined to arbitrate the employees' ADEA claims but nonetheless authorized individual employees to proceed to arbitration on their own. Noting this point, Justice Souter wrote, "On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration."

In light of *Pyett*, some have suggested that unions may be cautious about including provisions requiring mandatory arbitration of statutory discrimination claims as such provisions would seem to require that unions be prepared to actually arbitrate such claims. *Pyett* expressly preserved an employee's right to file a charge of discrimination with the EEOC or a state or local agency.

Eighth Circuit

Failure to File Rule 50(b) Motion After Entry of Judgment

[*EEOC v. Southwestern Bell Telephone, L.P.*](#), 550 F.3d 704 (8th Cir. 2008): The EEOC brought suit against AT&T on behalf of two employees who were discharged when they failed to report to work because they were attending a convention of their religious group. The EEOC claimed that AT&T engaged in unlawful practices by denying the employees a reasonable accommodation of their sincerely held religious beliefs and terminating their employment because of those beliefs. The district court denied AT&T's motion for summary judgment.

After the close of the EEOC's case, the district court denied AT&T's motion for judgment as a matter of law under Rule 50(a). Later, after presenting its evidence at trial, AT&T renewed its Rule 50(a) motion for judgment as a matter of law. In response, the district court stated that it did not want to hear any more argument on the issue and said that AT&T did not need to present its arguments again "to preserve your record." The jury subsequently found in favor of the EEOC and awarded the employees nearly \$400,000 each based on their lost wages, benefits, and compensatory damages. The district court also ordered AT&T to reinstate the employees. AT&T failed to renew its motion for judgment as a matter of law under Rule 50(b) within ten days of the entry of judgment.

AT&T then appealed from the district court's denial of its Rule 50(a) motion, arguing that the employees did not hold a sincere religious belief requiring attendance at the conference, that the award of damages should be reversed based on the employees' failure to mitigate their damages, and that the accommodation of allowing the employees to take a vacation day constituted an undue burden. The EEOC maintained that the court of appeals could not consider AT&T's arguments because AT&T had failed to renew its motion for judgment as a matter of law after the entry of judgment pursuant to Rule 50(b).

The court of appeals agreed and held that it could not consider the merits of the appeal. The court noted that the Supreme Court had held in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), that when a party fails to file a Rule 50(b) motion, there is no basis for appellate review of any sufficiency of the evidence challenge. Observing that the procedural posture of the case before it was "virtually identical" to *Unitherm*, the court held that *Unitherm* precluded appellate review of each of AT&T's arguments on appeal, which the court deemed to be arguments based on the sufficiency of the evidence.

The court was unmoved by AT&T's argument that it was not required to file a Rule 50(b) motion because of the district court's statement, when AT&T renewed its Rule 50(a) motion at the close of all of the evidence at trial, that it did not want to hear any more argument and

that the issue was preserved. The court of appeals wrote that the law was well established that AT&T was required to file the Rule 50(b) motion to preserve the issues for appeal. The district court did not ever direct AT&T not to file a Rule 50(b) motion; rather the district court's statements meant that it was unnecessary for AT&T to repeat its arguments made in support of its motion for summary judgment and initial motion for judgment as a matter of law because the arguments were sufficiently preserved to allow AT&T to file a Rule 50(b) motion after the entry of judgment.

This case serves as a reminder of the stark adverse consequences that can follow from a party's failure to file a timely Rule 50(b) motion for judgment as a matter of law after the entry of an adverse judgment.

District of Minnesota

Genuineness of Reduction-in-Force

[*Stenberg v. I.C. Sys., Inc.*](#), 2009 U.S. Dist. Lexis 45441, 2009 WL 1507417, 21 Am. Disabilities Cas. (BNA) 1666 (D. Minn. May 29, 2009): The plaintiff was employed as a telephone representative of a debt collection agency. She was discharged in May 2006 at age sixty-two along with another representative who was then seventy-one years old. These terminations occurred only three months after the company had hired two new, younger telephone representatives (ages thirty-five and forty-eight). The employer maintained that plaintiff was discharged because of a reduction-in-force (RIF) and a related "productivity analysis" of the phone representatives.

In denying the employer's motion for summary judgment, Judge Montgomery focused on the fourth element required to establish a prima facie case: that the plaintiff was replaced by "someone substantially younger," a standard that, in RIF cases, is modified to require that the plaintiff make an additional showing that age was a factor in the employer's decision. The plaintiff asserted that a fact issue had been raised about whether the employer's alleged RIF was "bona fide." Judge Montgomery agreed and therefore denied the employer's motion. Factors cited in support of this ruling included: the employer's hiring of two younger representatives shortly before the alleged RIF; the company's expanding revenues, customer base, and number of locations and employees in the time period leading up to the alleged RIF; and the lack of any written documentation of the decision to conduct a RIF. Judge Montgomery wrote that "a lack of objective evidence of a business decline can give rise to a fact question regarding the genuineness of a RIF." Because such a fact issue had been raised, the plaintiff was required to show only that she was replaced by someone substantially younger to satisfy the fourth element of her prima facie case. This standard was satisfied by the evidence of the hiring of the substantially younger employees shortly before the alleged RIF.

Executive's Age-Related Remarks

[*Thompson v. Buhrs Ams., Inc.*](#), 2009 U.S. Dist. Lexis 16592, 2009 WL 537633 (D. Minn. Mar. 3, 2009): The plaintiff was hired as the president of a U.S.-based subsidiary of a Dutch

corporation when he was forty-nine years of age and was discharged less than a year later. Executives of the foreign parent company had some involvement in supervising and managing the plaintiff. Judge Ericksen of the U.S. District Court denied the employer's motion for summary judgment based primarily on evidence that a Dutch executive of the parent company who was the chairman of the board of the domestic subsidiary made several age-related statements:

- The executive wrote "50?" on the first page of the plaintiff's resume.
- The executive asked the plaintiff after his hiring how old he was.
- The executive referred to the plaintiff as "the elder leader" of the domestic subsidiary.
- The executive repeatedly instructed the plaintiff to hire candidates younger than himself for open positions at the subsidiary.

Although declining to decide whether such evidence constituted direct evidence, Judge Ericksen held that the plaintiff had "adduced, by a thin margin, enough admissible evidence to raise genuine doubt as to whether" the employer's proffered reason for the plaintiff's discharge was the true motive.

"Target Date" Pension Plan

[Northwest Airlines, Inc. v. Phillips](#), 2009 U.S. Dist. Lexis 38927, 2009 WL 1287497, 46 Employee Benefits Cas. (BNA) 2308, 186 L.R.R.M. (BNA) 2576 (D. Minn. May 7, 2009): Judge Ericksen granted a motion for summary judgment brought jointly by co-plaintiffs Northwest Airlines and the Air Line Pilots Association (ALPA) adopting their position that a defined contribution pension plan agreed to between the airline and the union, under which age was one factor taken into consideration in determining benefits, did not violate the ADEA.

In a January order, 594 F. Supp. 2d 1075, while the court noted that the plan at issue was not a cash balance plan, it nonetheless adopted the reasoning of courts that have rejected ADEA claims based on such plans, observing that "[t]reating a younger pilot's increased earning potential resulting from his greater remaining years of service as a form of age discrimination is not sensible." Judge Ericksen also noted that "[a]lthough the Pilots base their challenge on the effect age has on projected final average earnings, they provide no data or information as to the actual effect of age, isolated from other variables, on projected final average earnings."

In the May order, Judge Ericksen denied a motion by ALPA for judgment on the pleadings on a duty of fair representation counterclaim asserted by individual pilots to the extent that the claim was based on alleged age discrimination by the union against more senior pilots in connection with the plan at issue. Judge Ericksen said that it decided only the narrow issue of whether the plan at issue "ceased allocations or reduced the rate of allocations to the Pilots' accounts because of age, not the broader issue of whether ALPA discriminated against the Pilots because of age in enacting" the plan. Responding to ALPA's contention that seniority was a relevant and rational basis for union decision-making, the court noted that the

argument was based on an assumption that ALPA's implementation of the plan "was a rational allocation rather than based on prejudice or animus to senior pilots."

Minnesota Court of Appeals

Class-Certification Ruling

[*Whitaker v. 3M Co.*](#), 764 N.W.2d 631 (Minn. Ct. App. 2009): Although this case does not involve ADEA claims, the opinion is of interest because it explains the standards for certifying age discrimination class actions under Minnesota state law. These standards are markedly different from the "similarly situated" standard applied in ADEA representative actions.

In *Whitaker*, the court of appeals reversed the Ramsey County District Court's order certifying a Minnesota Human Rights Act age discrimination case as a class action under Rule 23 of the Minnesota Rules of Civil Procedure. Parties moving for class certification under Rule 23 must prove by a preponderance of the evidence that all of the certification requirements (numerosity, commonality, typicality, and adequacy of representation) have been met. Thus, when the parties present conflicting evidence as to these standards, a district court must address the disputes in the evidence at the time of certification, rather than deferring such determinations to the time of trial.

The case has been remanded to the district court for further proceedings consistent with the court of appeals' ruling.

Evidence Deemed Insufficient to Raise Genuine Fact Issue

[*Mittelstadt v. Emergency Physicians Prof'l Assn.*](#), 2009 Minn. Ct. App. Unpub. Lexis 419, 2009 WL 1047903 (Minn. Ct. App. Apr. 21, 2009): The court of appeals upheld summary judgment in favor of the employer in this case in which a physician claimed that his employer's decision not to renew his year-to-year employment contract was motivated by age discrimination. The court concluded that a comment by the plaintiff's supervisor that there were "many fresh, new residents to pick from" was "merely a factual assertion" and contained "no explicit reference to [the plaintiff] or any animus toward older physicians." The court also found that evidence relating to the hiring and non-renewal patterns of the employer and the treatment of younger physicians did "not provide a specific link between the discriminatory intent and the nonrenewal" of the plaintiff's contract.



Labor & Employment Law Section



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Title VII Update

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Discrimination

[*Qamhiyah v. Iowa State University of Science & Technology*](#), 566 F.3d 733 (8th Cir. 2009): This denial of tenure case raised the “cat’s paw” issue, which the court described as follows: “[C]at’s paw’ refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” The court noted its prior holding that “an employer can be liable, under certain circumstances, where the formal decisionmaker is not the person who harbored an unlawful motive.” The court then listed and compared its prior holdings, and the facts upon which they were based, and declined to further define the precise level of control biased subordinates must exert before liability will be attributed to employers.

The court affirmed the dismissal of Qamhiyah’s case because, even assuming discrimination existed at the lower levels of her tenure review, the court saw no evidence that the Board of Regents (the ultimate decisionmaker) “served as the conduit, vehicle, or rubber stamp by which another achieved his or her unlawful design.” The primary factor that seemingly persuaded the court was that the University’s review process included dozens of faculty and an independent review by the Provost, who reviewed the file three times and met with Qamhiyah to hear her concerns about the process.

Judge Colloton, although concurring in the result reached by the district court, wrote separately to highlight the difficult issues of causation raised by the majority’s assumption that discrimination existed at lower levels of the review. He noted a letter from a dean stating that recommendations of lower level employees were the “main reason” for the denial of tenure, which would argue against the majority’s conclusion that lower level employees did not infect the ultimate decision.

Retaliation

[*Wallace v. DTG Operations, Inc.*](#), 563 F.3d 357 (8th Cir. 2009): This case was brought under the Missouri Human Rights Act. It was appealed after a jury verdict awarding the plaintiff \$10,000 in lost wages and benefits, \$20,000 in emotional anguish damages, and \$500,000 in punitive damages.

The evidence noted by the court of appeals included the following: that the company provided shifting explanations as to the reason for termination, initially attributing the termination to a downturn in business, but later stating that poor performance was an issue; that at least one decisionmaker expressed anger based on the plaintiff's mode of reporting the alleged sexual harassment, even though she followed a recommended reporting method; and that the plaintiff's termination was isolated among comparable employees, notwithstanding the company's claims that company-wide layoffs were required at the time. The court of appeals also noted that the timing of the termination, fifteen days after her complaint, served as evidence of retaliation. The employer challenged the trial court's jury instruction on causation, which used a "contributing factor" standard rather than a "determining factor" standard. The court of appeals affirmed the district court's use of the "contributing factor" standard under Missouri law and affirmed the verdict, but reduced the punitive damages award to \$120,000.

[*Littleton v. Pilot Travel Centers, LLC*](#), 568 F.3d 641 (8th Cir. 2009): The court of appeals affirmed a grant of summary judgment on retaliation, but called the "material adverse action" element "difficult" and discussed its post-*White* application of the retaliation standard. See *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006).

On the question of what constitutes an adverse action, the court noted the Supreme Court's rejection of prior Eighth Circuit case law requiring a "materially adverse action" to include financial harm. The court required Littleton to show that the employer's actions "harmfully impacted his employment." The court noted the Supreme Court's direction that an adverse action is anything that might dissuade a reasonable worker from making a charge of discrimination.

With respect to the employer's express threat to terminate Littleton, the court then posed the question: "If the co-worker accusations were false, and if Pilot knew they were false, should the retaliation claim be dismissed out of hand because this kind of formal disciplinary notice, even if retaliatory, would not *as a matter of law* have dissuaded a reasonable worker from making a charge of discrimination?" (emphasis in original) The court answered the question by noting the Supreme Court's observation in *White* that "context matters" and adding that more analysis is needed. The court then turned to the question of causation, without ever returning to the question of whether the threat of termination was an "adverse action."

[*Franklin v. Local 2 of Sheet Metal Workers International Association*](#), 565 F.3d 508 (8th Cir. 2009): In this case, a group of employees sued the union for racial discrimination in job placement under disparate impact and disparate treatment theories and for retaliation. The district court granted summary judgment on the disparate treatment and retaliation claims. After a bench trial, the district court found in favor of the union on the disparate impact claim.

On appeal, the Eighth Circuit affirmed the judgment on the disparate impact claim but reversed the grant of summary judgment on retaliation. The adverse action alleged by the employees was the union's posting and reading of legal bills at member meetings and identifying by name members who had filed EEOC charges. The court of appeals determined that the evidence raised a "possible reasonable inference Local 2 was aware of a negative impact on Appellants based upon the listing and, during meetings, reading of Appellants'

names, claims and related costs" and "the degree of Local 2's disclosures raises credibility issues and a potential reasonable inference of retaliation."



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Family and Medical Leave Act

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Estoppel Based on Human Resources Manager's Statement

[*Reed v. Lear Corp.*](#), 556 F.3d 674, 157 Lab. Cas. (CCH) P35,542; 92 Empl. Prac. Dec. (CCH) P43,456; 14 Wage & Hour Cas. 2d (BNA) 903 (8th Cir. 2009): The Eighth Circuit Court of Appeals affirmed summary judgment for the employer finding that (1) the employer was not estopped from denying FMLA leave based on an alleged statement by a human resources manager that the employee was on "provisional" FMLA leave; (2) the statute of limitations on the employee's FMLA claims had begun to run on the day the company denied the FMLA leave, not the employee's termination date; and (3) the company could not have interfered with the employee's FMLA rights because the employee was not entitled to FMLA leave.

Michael Reed worked for Lear Corporation in an assembly line making rear car and truck seats for Chrysler. Reed's job required heavy lifting and significant bending and twisting causing Reed to develop back trouble and to miss work frequently.

In August 2003, Lear implemented a new attendance policy under which an employee would be terminated for accumulating twenty-four points in any twelve-month period. Vacation days and FMLA-qualifying leave were excepted from the point system.

In October 2003, Reed asked for FMLA leave for his back condition and submitted a medical certification form completed by his chiropractor. Because the chiropractor wrote that Reed was "not presently incapacitated" and that he could work a full-time schedule, Scott Patsaros, a Lear human resources specialist, provided Reed a written denial of his FMLA request. Lear shortly thereafter terminated Reed due to excessive absences but subsequently reinstated him under a company-wide rollback of attendance points. Reed had fifteen attendance points when reinstated.

On November 6, 2003, Reed submitted a second request for FMLA leave with a second medical certification from his chiropractor. This time the chiropractor stated he could not determine the full extent of Reed's condition until a neurosurgeon examined him as scheduled on November 26, 2003.

On November 26, 2003, Reed received a second letter from Patsaros, which the company considered a clear denial of Reed's second FMLA leave request. Reed was confused by the

letter's contents, however, and took it to his union steward for clarification. Together they went to talk with someone in human resources. The union steward entered a room where several people were meeting and talked with Joel Kato, the person in charge of overseeing the company-wide FMLA program, about the letter. Reed stood outside the door while the union steward talked with Kato and later claimed that he had overheard Kato say that Reed was on a provisional FMLA leave. Kato later denied making any such statement. Reed did not talk with Patsaros about his confusion regarding the letter even though the FMLA packet Reed had received earlier instructed him to do so if he had questions.

Reed claimed "provisional" FMLA in reliance on 29 C.F.R. § 825.307(a)(2) [[29 C.F.R. § 825.307\(b\)](#) effective Jan. 16, 2009], which provides that an employer may seek a second medical opinion after an employee has provided a medical certification that the employer questions and that the employee is "provisionally entitled to the benefits of the [FMLA]" pending receipt of the second (or third) medical opinion.

Reed missed work on December 5, 6 and 12, 2003, increasing his attendance points to twenty-four, and Lear terminated Reed effective January 7, 2004. On January 5, 2006, not quite a full two years after his termination date but more than two years after the denial of his second FMLA request, Reed filed his lawsuit.

Reed made three arguments. The first was that Lear was estopped from denying him FMLA leave because he overheard Kato tell the union steward he was on provisional FMLA leave. The Eighth Circuit rejected Reed's claim, however, finding that the November 26th letter clearly denied Reed's request for FMLA leave. Further, the court found it was reasonable to conclude that Reed was not protected by the FMLA because the chiropractor's second medical certification did not certify a need for medical leave. Finally, the court found that Reed had been negligent in not seeking clarification regarding the contents of the November 26th letter directly from Patsaros, because Patsaros worked at the same plant as Reed and his telephone number was included in the FMLA packet Reed had received.

Second, Reed disputed the district court's finding that his lawsuit was time-barred given that the FMLA has a two-year statute of limitations (no allegation was made that the three-year limitations period for willful violations applied). See 29 U.S.C. § 2617(c)(1). Reed argued that the statute of limitations began to run on his termination date (January 7, 2004), not the date he received the second denial of FMLA leave (November 26, 2003), again relying on his argument that Lear should be estopped from claiming it had denied his FMLA leave because the denial letter was allegedly unclear. The Eighth Circuit reiterated its rejection of Reed's estoppel argument and ruled that an alleged FMLA violation occurs when an employer improperly denies FMLA leave, not when a termination occurs, even though it may follow such denial.

Third, Reed argued that Lear had interfered with his FMLA rights when it refused to retroactively designate his December absences as vacation days. The Eighth Circuit ruled, however, that because Reed's medical certification did not state that he was unable to work because of a serious health condition, he never made a provisional showing that he was eligible for FMLA leave and, therefore, was not entitled to "provisional" FMLA leave. Because

Reed was never even provisionally qualified for FMLA leave, Reed was never entitled to have Lear treat his December absences as vacation days.

Interference and Retaliation Claims Where Employee Altered Physician's Form

[Smith v. The Hope School](#), 560 F.3d 694, 157 Lab. Cas. (CCH) P35,562; 92 Empl. Prac. Dec. (CCH) P43,532; 14 Wage & Hour Cas. 2d (BNA) 1185 (7th Cir. 2009): The Seventh Circuit addressed the novel issue of whether an employee's alteration of an FMLA medical certification form, which without alteration would have provided adequate certification for the employee's request for FMLA leave, should disqualify the employee from FMLA leave because of her fraud or whether the employer should have been required to set aside the fraud and read the certification without the employee's false additions. The Seventh Circuit sided with the employer and upheld summary judgment dismissing the employee's claims.

Tanum Smith worked at the Hope School, a residential facility for children with developmental disabilities. Twice in just over a two-month period in April through June 2006 Smith was injured in separate altercations with students and, as a result, visited a chiropractor, a worker's compensation physician, and her own primary care physician, Dr. Cara Vasconcelles. As a result of the two altercations, Smith began experiencing anxiety and feared working with students. In response, Hope School ultimately assigned Smith to work in the school's dietary department where, the school said, she would not interact with students. Smith, however, claimed that students entered the dietary department to obtain their lunch trays and utensils, causing her increased anxiety.

In mid-August, Smith began missing work time and began her attempt to obtain FMLA leave for her absences. Smith left the FMLA medical certification form with Vasconcelles' office on August 28th, and Vasconcelles completed the form the same day.

When Smith did not show up for work on August 29th, the school wrote to her telling her, among other things, that "failing to show up at work would count as an unexcused absence." This was the second letter the school had written to Smith in August with this warning.

Smith picked up the completed FMLA medical certification from Vasconcelles' office on September 6th. Vasconcelles had written that "Smith was having 'severe recurrent muscle tension [headaches] and [right] neck & arm pain [secondary] to trauma suffered at work.'" Smith later admitted that when she picked up the form she added the words "'plus previous depression'" under what Vasconcelles had written. Neither Vasconcelles nor any other physician had ever diagnosed Smith with depression. Smith also backdated her signature to August 25th, which was even before she had picked up the form from the school on August 28th. (Smith also completed a second, separate "Attending Physician's Statement" on which she listed diagnoses of "muscle tension, chronic headaches, and depression.")

When the Hope School received a faxed copy of the form signed by Vasconcelles, it immediately suspected that it had been altered. So a human resources employee called Vasconcelles' office, which confirmed the alteration.

The Seventh Circuit noted that the call to Vasconcelles' office was a violation under the old FMLA regulations but also noted that the current FMLA regulations allow such contact, *see* [29 C.F.R. § 825.307\(a\)](#) (effective Jan. 16, 2009), and further noted that the old regulations provided no remedy for such a violation "unless it interfered with or restrained an employee's rights under the act."

After contacting a Department of Labor representative regarding the school's rights given Smith's alteration of the medical certification form, the school on September 11th sent Smith written notification that it was denying her FMLA request based on the altered paperwork and her failure to provide timely notice.

Following a termination hearing on September 14th and another disciplinary meeting on September 19th, Hope School ultimately terminated Smith's employment.

Smith alleged interference and retaliation in violation of the FMLA and a workers' compensation retaliation claim. The district court granted Hope School's motion for summary judgment on all counts.

As to Smith's FMLA interference claim, the Seventh Circuit agreed with the district court that Hope School rightly denied Smith FMLA leave based on Smith's multiple alterations to the Vasconcelles' medical certification form without the knowledge or approval of Vasconcelles. The court rejected Smith's argument that the school should have ignored her alterations and used only the part of the form that Vasconcelles had completed stating, "We are convinced that Smith's proposed rule would have the effect of encouraging applicants to dress up an application for leave by adding non-existent conditions."

While it affirmed dismissal of Smith's FMLA interference claim, the court also specifically noted the narrowness of its ruling, explaining that it was making no finding whether "more insignificant alterations, such as correcting a typographical error or correcting or adding to a portion of the form with the knowledge and approval of a treating physician, would result in a similar ruling." Also, the court noted that it was not deciding what decision it would have reached had Smith re-submitted the authentic, unaltered medical certification form signed by Vasconcelles after Smith already had submitted the altered document.

The Seventh Circuit also made short shrift of Smith's FMLA retaliation claim. Because Smith was never entitled to FMLA leave for her absences, the school could not have interfered with Smith's FMLA rights when it terminated her employment because of the unexcused absences. *See* [29 C.F.R. § 825.216\(d\)](#) (same effective Jan. 16, 2009).

Retaliation and Interference Claims When Health Insurance Was Retroactively Cancelled

[*Ryl-Kuchar v. Care Centers Inc.*](#), 565 F.3d 1027; 157 Lab. Cas. (CCH) P35,570; 14 Wage & Hour Cas. 2d (BNA) 1446, May 11, 2009 (7th Cir. 2009): The Seventh Circuit affirmed the district court's denial of Care Centers' motion for judgment notwithstanding the verdict, affirming the jury's award of monetary damages and remanding the case for calculation of the appropriate fee award.

Kathleen Ryl-Kuchar was pregnant with triplets while working as a dietary consultant for Care Centers in 2002. Ryl-Kuchar continued to work full-time on site until she could no longer fit behind the steering wheel of her car. With the approval of the company's chief operating officer, in May she began working from home but did fall below thirty-five hours per week. Ryl-Kuchar did not request FMLA leave during this time, and, apparently, the company did not apply FMLA leave to Ryl-Kuchar's reduced hours.

Ryl-Kuchar gave birth on July 17, 2003, to three boys and, after only a short hospital stay, again began working from home. Only when the dual role of full-time mom and working became too much did Ryl-Kuchar begin taking FMLA leave intending to return to full-time work later in the fall. She later determined she could not do so and resigned effective October 1.

In early 2004, Ryl-Kuchar learned (as a result of receiving notice of unpaid medical bills related to her pregnancy and delivery) that her company-provided health insurance had been cancelled in November 2003 retroactively to June 15, 2003. The employee benefits association (CCS Veba) that administered Care Centers' health insurance had determined that Ryl-Kuchar became a part-time employee while working from home prior to giving birth and, therefore, should have been taken off the health insurance coverage.

Ryl-Kuchar sued both CCS Veba and Care Centers for interference with her FMLA rights and retaliation on the theory that the real reason for cancelling her health insurance retroactively to June 15th was her decision in August to take FMLA leave, not her alleged part-time status.

The Seventh Circuit quickly determined that although CCS Veba was ostensibly a separate organization, its actions were easily imputed to Care Centers. The CCS Veba plan administrator was married to the owner of Care Centers, CCS Veba was referred to as the "insurance department" of Care Centers, and CCS Veba was located in the same facility as Care Centers.

The Seventh Circuit affirmed the jury's verdict that Ryl-Kuchar had met her burden of proof on her FMLA interference claim showing (1) she was eligible for FMLA protection both during her pregnancy and following the birth of her triplets; (2) Care Centers was covered by the FMLA since it had more than fifty employees; (3) she was entitled to FMLA leave since she had been employed with Care Centers for more than fifteen years and had worked full-time up to her reduced schedule beginning in May; (4) she gave sufficient notice of her intent to take FMLA leave; and (5) Care Centers, through CCS Veba, had improperly denied her health insurance coverage, a benefit to which she was entitled under the FMLA all the way up until she resigned her employment.

The Seventh Circuit also agreed with the jury's verdict on the retaliation claim. The court found there was sufficient evidence to indicate that the real reason CCS Veba had cancelled Ryl-Kuchar's health insurance was in retaliation for her taking FMLA, not because she had worked part-time. The court cited the inconsistencies in CCS Veba's explanation, the timing of the decision to cut off Ryl-Kuchar's health insurance coverage (only after she indicated she would take FMLA leave), and Care Center's earlier stated concerns about its rising health care costs.



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Wage and Hour

*By Daniel Leland
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FLSA § 216(b) Not a Jurisdictional Vesting Clause

[*Saleen v. Waste Management, Inc.*](#), 610 F. Supp. 2d 1026 (D. Minn. April 9, 2009): In *Saleen*, the defendant-employer sought to dismiss the plaintiffs' complaint arguing that the defendant was not the plaintiffs' "employer" within the meaning of the Fair Labor Standards Act ("FLSA"), and therefore the court lacked subject-matter jurisdiction over the plaintiffs' claims. The court disagreed.

The court analyzed the defendant's argument under the analysis set forth in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Of *Arbaugh*, the court noted that "if Congress intends to condition the existence of subject-matter jurisdiction on the presence or absence of a particular fact, Congress must make its intention unmistakably clear in the relevant statute."

The court held that the relevant language of the Fair Labor Standards Act, 29 U.S.C. § 216(b), is not a jurisdictional vesting clause. Instead, § 216(b) merely "states that certain actions may be maintained 'in any Federal or State court of competent jurisdiction.'" The court wrote, "If a statute grants jurisdiction over an action to a particular court, then that court is, by definition, a court of competent jurisdiction." The court found that the statute's reference to state courts further bolstered its holding as Congress does not normally grant jurisdiction to state courts—courts of general jurisdiction—although Congress may deprive state courts of jurisdiction over certain matters. The court stated that whether a plaintiff has stated a cause of action under § 216(b) is a question that goes to the merits of the case rather than to the court's subject-matter jurisdiction. The court concluded that § 216(b) does not contain a clear threshold limitation on federal jurisdiction and falls short of the standard articulated in *Arbaugh*.

Labor Management Relations Act Preemption of State Claims

[*Zupancich v. United States Steel Corp.*](#), No. 08-CV-5847 (D. Minn. May 27, 2009), available at 2009 WL 1474772, 2009 U.S. Dist. LEXIS 31109: In *Zupancich*, the plaintiff alleged violation of the Minnesota Fair Labor Standards Act ("MFLSA") by the defendant employer, which did not pay hourly employees for the time spent between swiping-in at the security gate and arriving at a work station and also deducted six minutes of paid work time if,

on leaving the premises, employees swiped their cards any sooner than six minutes after the end of a shift. The court examined whether the plaintiff's claims for violations of the MFLSA and for unjust enrichment and quantum meruit were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

The court's preemption analysis began by noting that, in determining whether a state law claim is preempted by § 301, a court must determine whether the state law remedy is "independent" of the collective bargaining agreement— that is, whether "resolution of the state-law claim does not require construing the collective bargaining agreement." The court specifically contrasted cases cited by the plaintiff—one in which individual and collective rights created by federal statutes were in tension and another in which determination of the state law claim was dependent on the CBA. The court stated that the question was not whether the statute created an individual right, but whether a claim asserting that right could be resolved on its merits without resort to the terms of the CBA.

The court held that the plaintiff's claim under the MFLSA was preempted. Citing Minnesota Statute section 177.35, the court noted "[u]nlike the Fair Labor Standards Act, the MFLSA specifically anticipates that employees may bargain collectively with their employers to establish wages and conditions of work more favorable to the employees than those required under the MFLSA." Thus, the MFLSA claim was "inextricably intertwined" with the CBA because the plain language of the MFLSA required the court to determine "whether the agreement negotiated by the parties, including the bargain over the swipe-in system, resulted in conditions that are more favorable to the employees."

The court held that the plaintiff's claims for unjust enrichment and quantum meruit were also "inextricably intertwined" with the CBA and were preempted. The plaintiff's unjust enrichment and quantum meruit claims were equitable claims, which could not be sought when there was an adequate remedy at law.



Labor & Employment Law Section



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

State Law Discrimination Update

By Anne M. Radolinski
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(Cases issued to June 15, 2009)

The Minnesota Court of Appeals issued three important decisions in the discrimination area this quarter – one clarifying standards for a prima facie case of reprisal, another clarifying standards for class certification, and yet another clarifying who is an “aggrieved party” for purposes of attorney’s fees awards. In addition, there are a number of interesting unpublished decisions, particularly one involving a claim of direct discrimination based on age, another involving marital status and reprisal claims.

Reprisal – Good Faith, Reasonable Belief Standard

[*Bahr v. Capella University*](#), 765 N.W.2d 428 (Minn. Ct. App. 2009): The Minnesota Court of Appeals in a recent decision clarified the standards for a prima facie case of reprisal under the Minnesota Human Rights Act, reversing a Rule 12 dismissal of claims for reprisal and remanding the case to the district court for further proceedings.

Bahr, a former supervisor with Capella, pursued reprisal claims under the MHRA following her termination. Bahr alleged that she had been terminated due to her good faith reports regarding Capella’s alleged discriminatory treatment of one of her supervisees and Bahr’s refusal to continue to participate in the alleged discriminatory employment practices. Bahr alleged that she had on at least four occasions complained to her supervisor and to human resources that she believed their handling of the performance issues and performance improvement plan for one of her supervisees, an African American woman, constituted race-based discrimination. Bahr in essence was complaining that she was being prevented from addressing the performance issues of the supervisee and that it was discriminatory and unfair to others in the department. Bahr was terminated within two months after her last such complaint regarding the alleged discriminatory treatment.

Capella moved to dismiss Bahr’s claims for failure to state a claim in that she failed to plead facts establishing that the practice she opposed constituted unlawful discrimination. The district court granted Capella’s motion.

The MHRA provides in pertinent part that it is an “unfair discriminatory practice for any individual who participated in the alleged discrimination . . . to intentionally engage in any reprisal against any person because that person . . . [o]pposed a practice forbidden under this chapter.” Minn. Stat. §363A.15. In order to establish a prima facie case of reprisal discrimination, a plaintiff must establish (1) statutorily protected conduct by the employee, (2) adverse action by the employer, and (3) a causal connection between the two. Bahr argued that for purposes of the first prong of the prima facie case, she need only allege a good faith reasonable belief that the employment practice she opposed was discriminatory, not that the practice actually constituted unlawful discrimination. Capella argued that a plaintiff must show that the employment practice opposed was actually discriminatory under the MHRA.

The court of appeals, in reversing the district court’s dismissal of Bahr’s complaint, adopted the Eighth Circuit’s “good faith reasonable belief” standard for purposes of pleading a prima facie case of reprisal discrimination under the MHRA. In doing so, the appeals court discussed the similarity in the language of the reprisal provision of the MHRA and the retaliation provision of Title VII, then engaged in a fairly lengthy discussion regarding statutory construction. The court cited to a number of Eighth Circuit and other circuit decisions adopting the good faith reasonable belief standard. *See e.g., Wallace v. DTG Operations*, 442 F.3d 1112, 1118 (8th Cir. 2006) (“[A]s long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claims.”) (further citations omitted).

Class Action Certification Standards

[*Whitaker v. 3M Co.*](#), 764 N.W.2d 631 (Minn. Ct. App. 2009): The Minnesota Court of Appeals reversed a district court’s certification of a class of more than 4,900 current and former 3M employees in an age discrimination action under the MHRA. 3M argued on appeal that the district court erred in failing to require proof of the Rule 23 class-certification requirements by a preponderance of the evidence and in failing to resolve factual disputes relevant to the class-certification requirements, in particular disputes between the evidence presented by experts for either side.

The court of appeals conducted an analysis of United States Supreme Court decisions on the topic, as well as federal circuit decisions interpreting the Supreme Court’s seemingly contradictory direction, and ultimately embraced 3M’s position. The appeals court thus ruled that, while factual determinations at the class-certification stage are not binding on the ultimate trier of fact, Rule 23 certification requirements must be shown by a preponderance of the evidence, and the court must resolve factual disputes relevant to the class-certification requirements.

The plaintiffs asserted two theories of discrimination in the case: (1) intentional discrimination in performance appraisal, selection for training programs, promotions, compensation, and termination; and (2) disparate impact discrimination in maintaining facially neutral policies in the above areas which allegedly resulted in an adverse impact on older employees.

Both theories were advanced by statistical proof. The plaintiffs' expert opined, among other matters, based on various regression analyses, that there were statistically significant disparities in the treatment of employees under the age of forty-six versus those forty-six and older in the five areas. The defendant's expert opined, among other matters, that one would expect performance, potential, rate of promotion, and pay increases to decline as an employee ages, even absent any age discrimination. The defendant's expert conducted a series of analyses and raised numerous objections to the methods and conclusions of the plaintiffs' expert.

The district court, in granting the class-certification motion, acknowledged the dispute among the experts but declined to resolve the dispute and indicated that the plaintiffs had presented statistical evidence that strongly suggested a consistent pattern of disparities suffered by older employees.

The court of appeals determined that the statistical evidence was relevant not only to the ultimate merits of the claims but also to the Rule 23 certification requirements because the statistics may provide the necessary proof to "bridge the gap between their individual claims of discrimination and the existence of a class of similarly situated employees." The court of appeals provided an unusual amount of direction to the district court upon remand:

The standards that we adopt . . . require the district court to resolve the differences among the experts to the extent that they are relevant to, and for the limited purposes of, determining whether class-certification requirements were met. In particular, the district court, using the preponderance-of-the-evidence standard, must address and decide all of the alleged defects in respondents' expert-witness testimony relating to the rule 23 requirements of numerosity, commonality, typicality, and predominance. This means that the district court must determine the validity and weight of 3M's concerns with demonstrating a baseline of expected, non-discriminating differences, bridging the gap between individual claims of discrimination and the existence of a class of similarly situated employees, selected problems with doing a "snap-shot" analysis, and the alleged inappropriate use of certain statistical controls for the predicted non-discriminatory correlation between age and employment outcomes.

Aggrieved Party and Attorney's Fees

[Baer v. J.D. Donovan, Inc.](#), 763 N.W.2d 681 (Minn. Ct. App. 2009): The court of appeals recently denied an attorney's fees award to a plaintiff who successfully challenged a hiring practice, ruling that within the meaning of the Minnesota Human Rights Act he was not an "aggrieved party" with respect to the violation upon which his challenge was based.

Baer was an unsuccessful applicant for a position with JD Donovan, a trucking company. The company's application contained questions regarding on-the-job injuries and lost work for illness, among other inquiries. Baer answered some of the questions but not others, and he apparently omitted answers to some legitimate questions. He was not hired, and he pursued a claim under the MHRA. His sole basis for recovery was that the company violated the MHRA by requiring him to provide information regarding his health, prior injuries, and disabilities.

The district court denied the company's summary judgment motion and granted Baer summary declaratory relief, ruling that the inquiries on the employer's application constituted a violation of the MHRA as a matter of law. The district court also ruled, however, that Baer would be required to prove at trial that he suffered a tangible injury and was thus entitled to damages. At trial Baer failed to do so. The district court imposed a \$500 civil penalty for the violation but awarded no damages to Baer. The district court found, among other matters, that Baer had failed to answer some legitimate questions on the application and that offers of employment were made to at least two other individuals who had provided virtually identical answers to the challenged application questions. Baer's application also showed that he had not driven the type of truck used by the company for seventeen years.

The court of appeals, in ruling that Baer was not an aggrieved party, reasoned in part that although the MHRA prohibits an employer from either "requiring" or "requesting" unlawful information of an applicant, an applicant is only an "aggrieved party" if he/she was required to provide the unlawful information. Baer would have been an aggrieved party for purposes of his claim "if he suffered the requirement, not merely the request, for information pertaining to [his] disability." Interesting to this point, the appeals court noted that the employment application itself indicated that the information related to disability was required, but the court nevertheless deferred to the district court's findings. Because he was not an aggrieved party, Baer was not entitled to nominal damages or attorney's fees. Minn. Stat. § 363A.33, subs. 6, 7.

Age

[Mittelstadt v. Emergency Physicians Professional Association](#), No. A08-0879 (Minn. Ct. App. April 21, 2009) (unpublished decision): The court of appeals upheld summary judgment in favor of the employer in a case involving a direct age discrimination claim as well as a claim based on circumstantial evidence by a physician-employee.

The arguments on appeal centered in large part on a statement made by the president of the EPPA to the effect that the group had "many fresh, new residents to pick from" out of the residency programs in Minnesota. The physician's contract was not renewed after a long series of performance issues. The president's statement regarding the "many fresh, new residents" was made in the context of the meeting to inform the physician of the nonrenewal. After the physician's termination, the group hired two recent graduates in their thirties.

Mittelstadt argued on appeal that the president's statement was direct evidence of discrimination. Direct evidence shows a "specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." The appeals court determined that the "fresh, new faces" comment did not provide such a link, was "merely a factual assertion," and did not contain any explicit reference to the physician or any "animus towards older physicians."

In regard to the discrimination claim based on circumstantial evidence, the appeals court confirmed that the physician had established a prima facie case and that the employer had proffered legitimate nondiscriminatory reasons for the termination. The decision contains a

lengthy discussion and analysis regarding the evidence proffered by the physician to show pretext, including but not limited to contract renewal patterns and job performance and accomplishments. The appeals court determined that the physician had failed to raise a genuine issue of material fact as to pretext, affirming summary judgment.

Marital Status and Retaliation

[Savoren v. LSI Corp. of America](#), No. A08-0674 (Minn. Ct. App. February 24, 2009) (unpublished decision): The court of appeals affirmed summary judgment in favor of the employer on claims of marital status discrimination and retaliation brought by the company's former human resources manager.

Patricia Savoren was terminated along with the head of engineering and the director of manufacturing (her husband). In March 2006, another employee filed a sexual harassment complaint against the company. Patricia Savoren's husband was one of the individuals named in the complaint for having made inappropriate comments. The matter was resolved in mediation, but an executive from the parent company was displeased with the couple's handling of the mediation and reported his displeasure to the parent's CEO. The CEO visited the facility due to his concerns regarding the performance of the facility and concerns raised by employees and customers, then terminated Savoren, her husband, and also the head of engineering.

The appeals court determined that there was no evidence that the company considered her marital status in the termination, noting that alleged marital-status discrimination "must be 'directed at the marital status itself.'" In relation to the retaliation claim, the appeals court noted that Patricia Savoren participated in the investigation and mediation as part of her job as human resources manager and therefore did not engage in statutorily protected conduct as required in the prima facie proof of retaliation. "[E]mployees do not engage in protected activity when making reports in the normal course of their . . . duties."



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Unemployment Compensation

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Changes to Unemployment Compensation Law

In April 2009, the Minnesota legislature enacted changes to the unemployment compensation benefit law. [2009 Minn. Laws page 472](#), 2009 Minn. Sess. Law Serv., ch. 78, Art. 3 § 12 (West) (to be codified at Minn. Stat. § 268.095). The following changes become effective on August 2, 2009. This list does not include all changes made to the unemployment compensation benefits law, nor are all changes effective August 2, 2009.

- **Quit.** The circumstances under which an employee can quit a job and still be eligible to receive unemployment benefits have expanded to include situations in which the individual leaves employment to care for a family member due to an illness, injury, or disability; because of domestic abuse of a family member; or to relocate to accompany a spouse whose job location has changed.
- **Misconduct.** The definition of “misconduct” does not include:
 - conduct as a consequence of mental illness or impairment;
 - absence necessary to provide care to an immediate family member as a result of illness, injury, or disability; or
 - conduct resulting from the applicant or immediate family members being the victim of domestic abuse.
- **Immediate family member.** “Immediate family member” means the applicant’s spouse, parent, stepparent, son or daughter, stepson or stepdaughter, or grandson or grandmother.
- **Single incident exception.** The language, “a single incident that does not have a significant adverse impact on the employer,” was deleted from the list of items that do not constitute employment misconduct. The following new language was added: “If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct.”
- **Suitable employment.** An individual will not be denied unemployment benefits if s/he was a part-time employee prior to losing her/his job and is seeking only part-time

employment. This change does not preclude such an individual from accepting full-time employment.

- **Available for suitable employment.** A student is no longer required to quit school if offered suitable employment. Instead, the new language requires the student to be willing to discontinue regularly scheduled classes to accept employment if attendance would restrict the applicant from accepting suitable employment or if the scheduled classes cannot be changed or other arrangements cannot be made.
- **Employers must provide wage detail information within five calendar days.** If the employer does not provide wage detail information within five calendar days of a request by the commissioner, the information the applicant provides will be used to determine the benefit amount.

Cases January 1, 2009 – May 31, 2009

Tougher Standards and Increased Job Duties

[*Olssen v. Supermom's, LLC*](#), A08-564 (Minn. Ct. App. April 7, 2009) (unpublished): Relator worked as a mixer for a large-scale baker beginning in 1990. In the fall of 2006 the employer added to all employees' duties the requirement of recording lot codes on batch sheets while mixing products in the event of a recall or food safety issue. In 2007, relator took on the additional job of mixing yeast-raised doughnuts. New management was also hired in 2007, and relator received a new supervisor. Employees were now held more accountable and were disciplined for making mistakes and errors. From October 2006 until his termination in August 2007, relator received six warnings. Prior to 2006, he had received only one warning.

In reversing the unemployment law judge's finding of misconduct, the appellate court held "with the employer's toughened job standards and relator's increased duties, relator did not perform the job to the employer's new and stricter standards. This is not misconduct under Minnesota Statutes section 268.095, subdivision 6(a)." The court noted relator's sixteen years of satisfactory performance, the evidence showing that relator did not repeat errors, and the fact that his performance became unsatisfactory only after the employer increased his duties and imposed heightened standards.

Failure to Present Evidence at Initial Telephone Appeal Hearing

[*Allman v. Sheet Metal Workers Federal Credit Union*](#), A08-524 (Minn. Ct. App. April 21, 2009) (unpublished): The day after she returned to work from medical leave, relator became upset with her supervisor, triggering a tension headache. When the headache worsened, she called her supervisor during lunch and stated she was too ill to work the rest of the day. When relator called her supervisor again later in the day, the supervisor told her leaving work was a "form of resignation." The employer then sent relator a letter confirming "the acceptance of her voluntary resignation."

During the telephone appeal hearing, the unemployment law judge (ULJ) indicated the issue at the hearing was the reasons for relator's separation from employment and briefly referred to discharge and employment misconduct. During the hearing, relator testified she did not quit but left because she was ill.

The ULJ's findings found relator did not quit her employment but that she committed "misconduct" because she was "not actually ill," had provided "illegitimate reasons" for leaving work, and "could no longer be trusted." Relator argued the ULJ should have ordered a new evidentiary hearing because her medical documentation would have changed the outcome and she had good cause for not submitting it at the hearing when she was informed the only issue at the hearing was "the quit determination."

The appellate court reversed and remanded the case for a new evidentiary hearing on whether relator committed misconduct. The court discussed the "good cause" standard for failing to submit evidence at the hearing. Minnesota Statute section 268.105, subdivision 2(c), which outlines the conditions for ordering an additional evidentiary hearing does not define "good cause." The court found that a parallel provision, subdivision 2(d), which addresses good cause for failing to participate in a hearing under a "reasonable person acting with due diligence" standard, provided guidance. The court concluded that the criteria of reasonable and due diligence should likewise apply in evaluating relator's failure to present her medical evidence at the initial hearing. Because relator had no indication that misconduct would be an issue at hearing, the court concluded that a reasonable person acting with due diligence would not have been fully prepared to provide medical evidence at the hearing and had good cause not to submit such evidence.

Employer's Misrepresentations Regarding Job

[*Bartleman v. TCF National Bank Minnesota*](#), A08-603, (Minn. Ct. App. March 10, 2009) (unpublished): Relator accepted a position as a consumer-loan officer based on the employer's representations during the job interview. The employer told relator during the interview that consumer-loan officers were making up to \$1,000 to \$2,000 per month in commissions and that his work hours would be 8:00 a.m. to 5:00 p.m. or 8:30 a.m. to 5:30 p.m. After accepting the position, relator was informed of new requirements: (1) the necessity of closing a minimum of eight loans a month to earn a minimum of \$300 in commissions; (2) working hours of 9:00 a.m. to 6:00 p.m.; and (3) the requirement of cold calling potential customers. After thirty-seven days, relator informed employer that his interviewer had made misrepresentations about the position and that the job was not a good fit for him.

The appellate court upheld the unemployment law judge's finding that relator was ineligible to receive benefits because he quit his employment for a reason other than a good reason caused by his employer. The appellate court reasoned that relator did not stay long enough on the job to earn a commission or determine if he could earn a commission through cold calling: "An average worker would have at least stayed on long enough to find out whether or not he could earn the commission he desired before quitting." The court also found that a thirty-minute change in hours was, quoting relator, not that "big of a deal," and cold calling would not compel an average person to quit.

Inconsistency Between Applicant's Written Answers on Unemployment Benefits Application and Testimony At Appeal Hearing

McCoy v. Department of Employment & Economic Development, A08-1145 (Minn. Ct. App. May 12, 2009) (unpublished): Relator applied for unemployment benefits while he was a full-time college student, attending classes two mornings a week. On relator's application, he stated his class attendance affected his ability to seek or accept employment, he was not seeking work, and he was unwilling to quit school to accept employment if necessary.

During the appeal hearing, relator testified that he stated on his application that he was unwilling to quit school because he did not understand the question and because his school was unaccredited. Contrary to his application, he also testified that he would be willing to quit school even though he had only a few months left until his degree because he could finish his degree by taking classes online or in the evening. The department found he was ineligible for benefits.

The appellate court confirmed. The court found that despite relator's testimony at the hearing, his application form "was clear and there is no evidence to support [relator's] contention that his answers were changed."



Labor & Employment Law Section



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Minnesota Tort and Contract Cases

*By Mary E. Stumo & Julie M. Giddings**
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Promotion as Consideration for a Restrictive Covenant

[Softchoice, Inc. v. Schmidt](#), 763 N.W.2d 660 (Minn. Ct. App. 2009): Softchoice, Inc. sought temporary injunctions against two former employees, Martin Schmidt and Michael Johnson, for alleged violations of non-competition and non-solicitation agreements. The district court granted a temporary injunction against Johnson, but denied Softchoice's motion as to Schmidt. Softchoice challenged the district court's refusal to issue an injunction against Schmidt, and Johnson challenged the district court's decision to issue a temporary injunction against him.

Softchoice hired Michael Johnson as a sales representative in 2001. On January 7, 2007, Johnson interviewed for the position of branch manager. He was informed in an e-mail from Softchoice's director of sales later that day that he had received the promotion and that a "formal offer out of HR" would "finalize everything." The following day Johnson's supervisor sent out an e-mail to all Softchoice employees in the United States informing them of Johnson's promotion. On January 16, 2007, Softchoice's human resources department sent a formal offer letter for the new position to Johnson detailing his new benefits and responsibilities. This letter contained a non-solicitation agreement, and the letter contained a statement that the job offer was contingent upon acceptance of the non-solicitation agreement. Johnson signed the offer and returned the letter to Softchoice on January 17, 2007.

On December 27, 2007, Johnson resigned from Softchoice. Soon after, Johnson began working for En Pointe. It was not disputed that Johnson violated the terms of his non-solicitation agreement. However, Johnson argued that the non-solicitation agreement was not supported by adequate consideration. Johnson claimed that he was promoted when he was first informed that he had the branch manager position, and that the promotion, therefore, could not serve as adequate consideration for the non-solicitation agreement contained in the letter. Softchoice argued that Johnson was not promoted until he signed the formal offer letter, which would then provide consideration for the agreement.

The Minnesota Court of Appeals held that a promotion serves as consideration for a non-compete agreement at the time when the terms of the promotion have been defined and the

promotion has been formally offered and accepted in writing. The key inquiry is whether the promotion provides the employee with “real advantages.” Because Johnson received an increase in compensation, duties, and benefits only at the time of signing the formal offer, the non-competition agreement was supported by consideration. The court of appeals held that the district court did not abuse its discretion in granting Softchoice’s motion for a temporary injunction against Johnson.

Another Softchoice employee, Martin Schmidt, entered into a stand-alone non-competition agreement as a condition of participating in an employee-retention plan under which he could potentially receive financial benefits. This retention plan and stand-alone non-competition agreement were governed by Missouri law pursuant to a choice-of-law clause. The court of appeals found that under Missouri law an employer must be obligated to contribute something of value into the plan at the time its employee enters the plan in order for the plan to constitute adequate consideration for a non-competition agreement. As the employee retention plan did not obligate Softchoice to pay anything, the court of appeals agreed with the district court that Softchoice was unlikely to succeed on the merits of its claim. The court of appeals stated that the decision may have been different had the analysis been conducted under Minnesota law, citing a case in which a Connecticut court found a retention bonus agreement to constitute adequate consideration. The court of appeals also noted that the opinion does not stand for the proposition that employee retention plans never serve as valid consideration for a non-competition agreement.

This article was written with the assistance of Kiri DeLaubenfels, Faegre & Benson summer associate and third-year law student at the University Of Iowa College Of Law.



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

State Legislation

By Ellen Sampson

Leonard, Street & Deinard

Criminal History of Potential Employees

Two new laws address inquiries about and use of criminal history information.

- [Minn. Stat. § 364.021](#) has been [added](#) to state that:

A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.

The language does not apply to the Department of Corrections or to public employers required to conduct criminal history background checks or consider criminal history when hiring. It does not prohibit a public employer from telling applicants that either the law or a policy may disqualify those with a particular criminal history from employment. This law is effective August 1, 2009.

- [Minn. Stat. § 181.01, et seq.](#) has been amended by adding [Minn. Stat. § 181.981, subd. 1](#) which holds that:

Information regarding a criminal history of an employee or former employee may not be introduced as evidence in a civil action against a private employer or its employees or agents that is based on the conduct of the employee or former employee, if: (1) the duties of the position of employment did not expose others to a greater degree of risk than that created by the employee or former employee interacting with the public outside of the duties of the position or that might be created by being employed in general; (2) before the occurrence of the act giving rise to the civil action, a court order sealed any record of the criminal case or the employee or former employee received a pardon; or (3) the record is of an arrest or charge that did not result in a criminal conviction.

This language does not override any legal requirements to conduct criminal background checks or consider criminal history when hiring for particular positions. It does, however, limit the admissibility of evidence about the criminal history of an employee or former employee, except under certain circumstances. The goal of the legislation is to encourage employers not to seek this information from applicants unless it is legally necessary. It is designed to

provide protection to employers who do not obtain that information. This law was effective August 1, 2009.

Clarification of Role of Minnesota Drug and Alcohol Testing Statute

- [Minn. Stat. § 221.031](#), sub. 10, has been [amended](#) to clarify that the State of Minnesota and any subdivision or other person who is required to comply with the drug and alcohol testing requirements under the Code of Federal Regulations is exempt from the drug testing requirements contained in Minn. Stat. § 181.950 to § 181.957 if the testing complies with the requirements of the federal regulations.

Minnesota Adopts A False Claims Act

- Minnesota now has a [False Claims Act](#), Minn. Stat. § 15C.01 et seq., which permits whistleblowers to receive financial rewards for exposing individuals making false claims to the state or to local governments. Twenty-two other states and the federal government have similar statutes. This new Minnesota statute may well work in conjunction with existing Minnesota statutes which protect whistleblowers and prohibit retaliation.

Employment Status of Truckers

- [Minn. Stat. § 176.043](#) which is effective August 1, 2009, states that:

In the trucking and messenger/courier industries, an operator of a car, van, truck, tractor, or truck-tractor that is licensed and registered by a governmental motor vehicle agency is an employee unless each of the following factors is present, and if each factor is present, the operator is an independent contractor: (1) the individual owns the equipment or holds it under a bona fide lease arrangement; (2) the individual is responsible for the maintenance of the equipment; (3) the individual is responsible for the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses. The individual may be paid the carrier's fuel surcharge and incidental costs, including, but not limited to, tolls, permits and lumper fees; (4) the individual is responsible for supplying the necessary personal services to operate the equipment; (5) the individual's compensation is based on factors related to the work performed, such as a percentage of any schedule of rates, and not on the basis of the hours or time expended; (6) the individual substantially controls the means and manner of performing the services, in conformance with regulatory requirements and specifications of the shipper; and (7) the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee.

This language affects eligibility of certain truckers for workers' compensation benefits; and, similar language amends Minn. Stat. § 268.035 dealing with unemployment benefits. These laws should alert employers to be certain of the status of the truck drivers they employ who may be covered by these laws.

Changes to Unemployment Statute

- [Minn. Stat. § 268](#) dealing with unemployment compensation has been modified by Chapters [1](#), [15](#) and [27](#) of Minnesota Laws 2009. The various chapters make changes in eligibility requirements and benefit periods and have various effective dates. There are multiple sections amended with different effective dates.

Changes to Workers' Compensation Statute

- [Minn. Stat. Chapter 176](#) dealing with workers' compensation has been amended to modify, among other things, the impairment ratings for permanent partial disability by [Chapter 75 of Laws of Minnesota 2009](#).

Removal of Limitation on Attorney or Agent Fees in Certain Matters

[Minn. Stat. § 15.471, subd. 5](#) has been [amended](#) to delete a provision limiting attorney or agent fees to \$125.00 an hour under certain circumstances. This provision is effective August 1, 2009.



Labor & Employment Law News

Vol. 23, No. 1 | Summer 2009

Public Sector

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Payroll Deductions for Political Purposes

[*Ysursa v. Pocatello Educ. Ass'n*](#), 129 S. Ct. 1093 (2009): The Supreme Court held that Idaho's ban on payroll deductions for political purposes does not infringe First Amendment rights.

In 2003 Idaho passed the Voluntary Contributions Act ("VCA"), which amended existing Idaho law to prohibit payroll deductions for political purposes. The plaintiffs, a group of labor organizations, sued a county prosecutor, the Idaho secretary of state, and the Idaho attorney general. The district court held the VCA did not violate the First or Fourteenth Amendments with respect to deductions taken on the state government level, holding that the First Amendment does not compel the state to subsidize free speech by incurring costs to set up and maintain the payroll deduction program. At the same time the district court struck down the VCA as applied to local governments and private employers because the state did not provide a subsidy to such employers to administer payroll deductions.

On appeal the state challenged only the issue of payroll deductions as applied to local governments. Applying strict scrutiny, the court of appeals affirmed the district court's decision because the state did not operate or control the payroll deduction system of local governmental units.

The Supreme Court granted certiorari and reversed. The Court initially explained that, although individuals have a right to be free from government abridgement of speech, the government is not required to assist in funding the expression of political ideas. Although unions may face difficulties in collecting funds for political purposes without using payroll deductions, states have no obligation to assist unions in their political activities. Because the state was not acting to abridge the right to free speech by unions, the state's action was only subject to rational basis scrutiny. The Court found that Idaho's justification was grounded in a desire to avoid an appearance of government impropriety or favoritism regarding political activities. The Court noted that such an interest has been upheld in the past and found Idaho's decision "plainly reasonable," citing *Davenport v. Washington Education Association*, 551 U.S. 177 (2007). In *Davenport*, the Court rejected a similar argument by unions and held that states do not have to assist unions in their political activities. As such, Idaho's decision to

ban deductions served the state's interest in separating public employment from political activities.

With regard to the prohibition on deductions at the local level, the Court noted that political subdivisions such as counties and cities are not sovereign entities but rather subordinate instrumentalities of the state. As a result states may grant or withhold powers as they see fit. The Court noted that rational basis review applies to all levels of governmental entities. Distinguishing the court of appeals' reasoning, the Court held that states have the right to regulate subordinate local governmental entities and do not have a duty to affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities.

Retaliation for Speech as Citizen

[Davenport v. University of Arkansas Board of Trustees](#), 553 F.3d 1110 (8th Cir. 2009): The Eighth Circuit held that a former employee's claim of unlawful retaliation may be based on speech that is not made pursuant to his official duties, but that the claim in this instance failed because there was no evidence the employee's protected speech was a motivating or substantial factor in the alleged unlawful retaliation.

Plaintiff Davenport worked for the University of Arkansas' Department of Public Safety ("DPS") for twenty-four years. In 1999 Davenport complained to the University that the Chief of DPS was misusing resources. In 2002 Davenport was interviewed by an Arkansas State Police investigator concerning the chief's activities. The chief subsequently resigned in light of various allegations. Davenport twice applied for the vacant job, but the position was awarded on each occasion to another employee.

Davenport alleged unlawful retaliation for protected speech under the First Amendment. Applying the Supreme Court's *Garcetti v. Ceballos*, 547 U.S. 410 (2006) decision, the Eighth Circuit held Davenport's 1999 statement was protected speech because he was speaking as a citizen regarding his public concerns about the chief. In addition, the Eighth Circuit determined that silencing Davenport's speech would not advance the University's interest in promoting efficient public services. Davenport's 2002 statement, however, was not protected because his job included a duty to cooperate with Arkansas State Police investigations. Examining the record the court found no evidence to indicate that Davenport's speech from 1999, even though protected, was a substantial or motivating factor in the University's decision not to promote him to the chief's position.

Negligent Misrepresentation and Constitutional Claims

[Williams v. Board of Regents of University of Minnesota](#), 763 N.W.2d 646 (Minn. Ct. App. 2009): The Minnesota Court of Appeals held that if an employee's negligent misrepresentation claim against a public entity can be determined without evaluating whether the public entity wrongfully discharged the alleged employee, judicial consideration of the claim is not limited to certiorari review by the court of appeals.

The Appellant, James Williams, was employed at Oklahoma State University as an assistant basketball coach until April 2007. Williams alleged that in April 2007 Tubby Smith, the head coach of men's basketball at the University of Minnesota, offered him a position as assistant coach at Minnesota. Williams alleged he accepted the offer, resigned at Oklahoma State, and sold his house in Oklahoma. Williams alleged the offer was an enforceable contract that was breached by the University of Minnesota and its athletic director, Joel Maturi. Williams also alleged Maturi refused to meet with him and made disparaging remarks to the media indicating that Williams was not hired because of his role in NCAA infractions some years earlier.

In September 2007 Williams filed suit alleging numerous common law and constitutional claims. The Respondents moved to dismiss the complaint on the grounds that the district court lacked jurisdiction on the common law counts and that both the common law and constitutional claims failed to set forth a sufficient claim for relief. The district court held that University employment decisions are subject only to certiorari review by the Minnesota Court of Appeals and dismissed the common law counts. The district court also held the constitutional claims failed to state a cognizable claim for relief and dismissed those counts.

On appeal the court of appeals noted that precedent establishes that the University is part of the executive branch of the state government and is therefore due deference under the separation of powers principle. The court also noted that certiorari review of termination decisions by a state agency has a long-standing history in Minnesota. On review the court held the dispositive question was whether the claim implicated an executive body's discretionary decision to terminate an employee. The court held Williams' estoppel claim was not subject to district court jurisdiction because it involved an inquiry into the University's hiring procedure and the University's decision not to hire Williams. On other hand, the court held the district court did have jurisdiction to consider a negligent misrepresentation allegation because it did not involve examining the actual hiring decision. The court remanded consideration of this claim to the district court.

The court also found two of Williams' § 1983 claims involving property interests were properly dismissed. If a terminated employee has access to a post-termination process and does not utilize that process, the employee cannot maintain a due process claim. Here, although Williams tried to meet with Joel Maturi, Williams did not adequately utilize the University's due process procedure. The court declined to address Williams' argument that he was entitled to a pre-determination hearing because it was raised for the first time on appeal.

The court also found Williams' liberty-interest claim, based on Maturi's statements injuring his reputation, lacked a legal basis. Maturi mentioned that Williams' NCAA infractions were a basis for the University's decision not to hire Williams. Although Williams denied the factual basis underlying the NCAA infractions, he never denied that he was found to have committed NCAA infractions. As a result Maturi's statements did not contain any false elements, thereby precluding a liberty-interest claim.

Lastly, the court upheld the district court's determination that Williams could not pursue a claim against Maturi because he is entitled to qualified immunity. Maturi, as a government official, has qualified immunity when performing discretionary functions unless he could

reasonably expect that his conduct would violate established statutory or constitutional rights. Here Maturi reasonably concluded that refusing to meet with Williams did not violate Williams' constitutional rights.

In sum, the court affirmed all of the district court's determinations except for the negligent misrepresentation claim, which was reversed and remanded to the lower court.